

FEDERAL CIRCUIT COURT OF AUSTRALIA

*MALHI v MINISTER FOR IMMIGRATION &
ANOR*

[2017] FCCA 119

Catchwords:

MIGRATION – Application for spousal visa – whether Applicant spouse of sponsor – whether Tribunal failed to perform its statutory task in determining whether the relationship (of Applicant and spouse) was a genuine and continuing one – held Tribunal misunderstood its task – jurisdictional error – whether Tribunal failed to comply with s.360 of the *Migration Act 1958* (Cth) – no jurisdictional error – writs issued.

Legislation:

Migration Act 1958 (Cth), ss.5F, 65, 360, 425

Migration Regulations 1994 (Cth), reg.1.15A, cl.801.221, sch.2

Cases cited:

Kayicki v Minister for Immigration and Citizenship [2009] FCA 92

Minister of State for Immigration, Local Government and Ethnic Affairs v Dhillon (unreported, Northrop, Wilcox and French JJ, 8 May 1990)

Re Minister for Immigration and Multicultural Affairs; ex parte Cohen [2001] HCA 10

Singh v Minister for Immigration and Border Protection [2016] FCCA 114

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 63; (2006) 228 CLR 152

Applicant: AMANPREET SINGH MALHI

First Respondent: MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent: ADMINISTRATIVE APPEALS
TRIBUNAL

File Number: MLG 813 of 2015

Judgment of: Judge Jones

Hearing date: 20 September 2016

Date of Last Submission: 20 September 2016

Delivered at: Melbourne
Delivered on: 2 February 2017

REPRESENTATION

Counsel for the Applicant: Mr Aleksov
Solicitors for the Applicant: Hymans Solicitors
Counsel for the Respondents: Mr Leerdam
Solicitors for the Respondents: DLA Piper Australia

ORDERS

- (1) A writ of certiorari issue directed to the Second Respondent quashing the decision of the Second Respondent dated 20 March 2015.
- (2) A writ of mandamus issue remitting the matter to the Second Respondent and requiring it to determine according to law the application made to it by the Applicant for review of the delegate of the First Respondent's decision.
- (3) The First Respondent pay the Applicant's costs.
- (4)
- (5)
- (6)
- (7)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT MELBOURNE

MLG 813 of 2015

AMANPREET SINGH MALHI

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The Applicant, Mr Amanpreet Singh Malhi, seeks judicial review of a decision of the then Migration Review Tribunal (“the Tribunal”) made on 20 March 2015, affirming a decision of a delegate of the Minister (“the delegate”) to refuse the grant the Applicant a Partner (residence) (Class BS) visa (“the visa”) under s.65 of the *Migration Act 1958* (“the Act”).
2. Applicants for the visa were required, at the time of the visa, to satisfy cl.801.221 of sch.2 to the *Migration Regulations 1994* (“the Regulations”).

3. Relevantly, cl.801.221 of sch.2 to the Regulations required that an Applicant to the visa be a spouse of the sponsor (as defined). In this case, the Applicant's sponsor is an Australian citizen and, accordingly, satisfied the meaning of a sponsor under the clause.

4. Section 5F of the Act defines “*spouse*” as follows:

Spouse

*(1) For the purposes of this Act, a person is the **spouse** of another person if, under subsection (2), the 2 persons are in a married relationship.*

*(2) For the purposes of subsection (1), persons are in a **married relationship** if:*

(a) they are married to each other under a marriage that is valid for the purposes of this Act; and

(b) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and

(c) the relationship between them is genuine and continuing; and

(d) they:

(i) live together; or

(ii) do not live separately and apart on a permanent basis.

5. Regulation 1.15A of the Regulations sets out the arrangements for the purpose of determining whether one or more of the conditions under sub-s.5F(2) of the Act exists. Sub-regulation 1.15A(2) of the Regulations provides that “*all the circumstances of the relationship, including the matters set out in sub regulation (3)*” must be considered. Sub-regulation 1.15A(3) of the Regulations provides:

(3) The matters for sub regulation (2) are:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

- (iii) *the extent of any pooling of financial resources, especially in relation to major financial commitments; and*
 - (iv) *whether one person in the relationship owes any legal obligation in respect of the other; and*
 - (v) *the basis of any sharing of day-to-day household expenses; and*
- (b) *the nature of the household, including:*
 - (i) *any joint responsibility for the care and support of children; and*
 - (ii) *the living arrangements of the persons; and*
 - (iii) *any sharing of the responsibility for housework; and*
- (c) *the social aspects of the relationship, including:*
 - (i) *whether the persons represent themselves to other people as being married to each other; and*
 - (ii) *the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
 - (iii) *any basis on which the persons plan and undertake joint social activities; and*
- (d) *the nature of the persons' commitment to each other, including:*
 - (i) *the duration of the relationship; and*
 - (ii) *the length of time during which the persons have lived together; and*
 - (iii) *the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) *whether the persons see the relationship as a long-term one.*

6. The delegate refused to grant the visa on the basis that the Applicant did not satisfy cl.801.221 of sch.2 to the Regulations, in particular, that the parties were in a genuine and continuing spousal relationship.

7. Background

8. The Applicant is a male citizen of India. He applied for a Partner visa on 13 October 2011 on the basis of his marriage to his sponsor, Ms Teresa Bartlett (“the sponsor”).
9. It is relevant to note, because as will become apparent, this formed a significant part of the reasoning of the Tribunal, at the time the Tribunal made its decision, the Applicant was 26 years of age and the sponsor was 52 years of age.
10. On 13 February 2014, the Applicant applied to the Tribunal for review of the delegate’s decision. A number of documents submitted by the Applicant were before the Tribunal when it made its decision. These documents included:
 - a) various identity documents, certificates and police clearance certificates;
 - b) documents relating to divorce and marriage;
 - c) statutory declarations by Efstathios Fatourisk, Gurmeet Singh (x2), Karen Kaur Sandhu (x2), Norma Yates, sponsor and the Applicant;
 - d) utility invoices, bank statements and building inspection documents;
 - e) travel itinerary for travel to Brisbane;
 - f) various receipts;
 - g) letter from Australian Electoral Commission to the sponsor;
 - h) statements by Applicant and sponsor;
 - i) submissions by the Applicant’s migration agent dated 12 September 2012;
 - j) photographs; and
 - k) various greeting cards.

11. The Applicant attended a hearing before the Tribunal, together with his sponsor, on 18 December 2014.

12. Tribunal Decision

13. The Tribunal recorded some of the evidence submitted by the Applicant and the sponsor (in their statements) (CB 297 at [9]-[13]). The Tribunal then considered the Applicant's relationship with the sponsor under headings which reflect the matters specified in sub-reg.1.15A(3) of the Regulations.

14. Financial aspects of the relationship

15. The Tribunal commenced by stating that it “*has concerns about the mutuality of the relationship overall, but this is also reflected in terms of the way the parties’ have set up their finances*” (CB 297 at [14]).
16. The Tribunal noted that the sponsor is established and had purchased and owned her unit prior to the marriage to the Applicant, and that she and the Applicant resided in that property (CB 297 at [14]). The Tribunal noted that, despite the parties having been married for some three years, the Applicant’s name is not on the title of the sponsor’s unit. The Tribunal noted that the parties stated that they intended to buy a house together when the Applicant has permanency (work and residency wise), and could obtain a mortgage together (CB 298 at [16]).
17. The Tribunal found that it was not persuaded by the evidence that the Applicant and sponsor had joint liabilities, pooled their financial resources or had any legal obligations to each other (CB 298 at [17]). The Tribunal accepted that the Applicant might contribute to household expenses, but found that this did not amount to any more than what might occur in a share house. Referring to an extract from a joint bank account commencing in 2012, the Tribunal noted regular salary deposits as well as cash deposits and conceded that the latter deposits were lodged by the Applicant for contributions to the household. It found, however, that this bank account did not amount to a savings account that would indicate that the parties were using it for the purposes of building a financial future together, because the amounts held on the account were minimal. The Tribunal did concede that the

Applicant had not been working more frequently until recently and that this may account for the build up of savings in more recent times (CB 298 at [19]-[20]).

18. The Tribunal was not satisfied, on the evidence, that the parties had a shared financial future together and expressed its concern that the parties maintained separately managed bank accounts. This concern appears to be based on a statement by the Applicant that the sponsor had purchased a new car, and the absence of evidence in documentation before the Tribunal as to where the funds for that purchase came from (CB 298 at [21]).

19. The Tribunal concluded (CB 299 at [23]):

In the absence of more persuasive evidence of the parties having made efforts to put in place savings mechanisms for a property and other joint assets (and the visa applicant's migration status is no impediment to such a joint arrangement) the Tribunal cannot be satisfied that the parties' arrangements are consistent with two persons in a genuine and continuing spousal relationship.

20. *The nature of the household*

21. In considering this factor, the Tribunal focused on the financial contributions by the Applicant to the household. The Tribunal appears to have conceded that the Applicant had contributed to utility accounts, and that there was other documentation consistent with the parties sharing a residence. However, it was not convinced, by documentation regarding individual purchases of furniture, in the absence of what it said was little evidence to indicate the purchases were shared. In any event, the Tribunal formed the view that these purchases were likely to have been purchased by the sponsor. The Tribunal appears to have focused on the fact that the sponsor owns the residence and that, therefore, it was not satisfied that the evidence submitted shows the parties live there as spouses (CB 299 at [24]-[25]). Overall, the Tribunal found (CB 299 at [26]):

The Tribunal would have expected that over three years the parties would have been able to demonstrate that they shared a home in which both parties invested and contributed in a manner commensurate with their financial capacity.

22. *Social aspects of the relationship*
23. In considering this matter, the Tribunal focused on the fact that the parties' wedding was not well attended and, in particular, that the Applicant's parents and sister did not attend from India, and that the sponsor's mother also did not attend the wedding. The Tribunal clearly formed the view that the parties rushed into the wedding, and was not satisfied with the Applicant's and the sponsor's explanations regarding the lack of attendance of family at the wedding and the timing of the wedding. The Tribunal stated that, in light of this, it had concerns about the extent to which the marriage was recognised by the respective families and friends as a genuine and continuing one (CB 299-300 at [27]-[28]).
24. The Tribunal accepted that the parties had travelled together, that there were photos showing them in tourist like locations and socialising with the sponsor's children, including the sponsor's mother, as well as family members of the Applicant. It acknowledged that it had received statutory declarations from the Applicant's cousin, Mr Gurmeet Singh, a relative of the Applicant and the sponsor's mother, attesting to the fact that they believed the relationship was a genuine and continuing one (CB 300 at [32]-[34]). The Tribunal noted that the sponsor had conceded that communication by telephone with the Applicant's parents was limited because they did not speak English. The Tribunal questioned the genuineness of an affidavit *"for which they had paid 50 rupees signed in India, in English, claiming to be from the visa applicant's parents. The "deponents" state the marriage between the parties had their consent and that they did not have any objection to the marriage and that they had a good relationship with the parties and that "they made phone call to us twice a week" (CB 300 at [35]).* With respect to this evidence, the Tribunal said (CB 300-301 at [36]):

The Tribunal questions if the parties do not speak English how they were able to prepare such an Affidavit as it is clearly not a translation. This document appears to have been stamped by officials without verifying the content of the document. Secondly, the Tribunal is perplexed, if the parties rang the visa applicant's parents twice a week, they were able to have a meaningful discussion with the sponsor when the parties have both stated that the visa applicant's parents speak little, if no English at all.

25. In circumstances where the sponsor spoke infrequently to the Applicant's parents because they did not speak English, and only spoke infrequently to the Applicant's sister, the Tribunal found that it did not consider that the affidavit, *"together with the vague evidence at hearing and the other statutory declarations submitted, are indicative of the visa applicant's immediate family socially recognising the parties' marriage as a spousal one as defined by the Regulations. This is particularly so as the visa applicant's parents did not attend the wedding; their only son's first wedding"* (CB 301 at [37]).

26. The Tribunal then proceeded to express its concerns as to matters which it believed undermined the social aspects of the relationship. Firstly, it expressed concern about the failure of the Applicant to have a thoughtful discussion with his parents regarding his marriage to a person of the sponsor's age. Secondly, and in particular, the Tribunal said (CB 301 at [38]):

... Whether the parents condoned the marriage or not, the Tribunal would have expected the visa applicant to speak in a more plausible way about how he presented the marriage to them; their reaction and any other words of support they may have provided in respect of him possibly never having children with the sponsor, given she is 52 years of age and the visa applicant is 26 years of age. Instead, the visa (sic) dismissed the issue of having children as a concern stating that they might adopt in the future, even though they were trying to have a child now.

27. The Tribunal, whilst accepting that Sikhs (the Applicant's family's faith) are open to inter-faith marriages and may have no concern whatsoever about the age difference between him and the sponsor, appeared to find the Applicant's evidence on this point vague. The Tribunal also found it incongruous that the Applicant's sister was the subject of a traditional wedding arrangement, whereas he was not. The Tribunal found it unconvincing that within one family, two totally divergent views on marriages would exist. The Tribunal did not find the parties' explanations convincing, particularly in light of the fact that the Applicant's parents did not attend his wedding, and *"there is limited credible evidence that they have discussed with the visa applicant the pros and cons of marrying a woman with whom he most likely would not be able to have biological children"* (CB 301 at [41]).

28. This theme underlying the Tribunal's concerns as to the social aspects of the relationship; namely, the difference between the visa Applicant and sponsor's age, and the sponsor's incapacity to provide a biological child to the Applicant, assumed a critical part of the Tribunal's reasoning when the Tribunal turned to consider the nature of the parties' commitment to each other. The consideration by the Tribunal is set out below.

29. The Tribunal further referred to statutory declarations from the Applicant's cousin and one of the sponsor's sons, but found (CB 302 at [45]):

The Tribunal has had regard to these third party statements but the Tribunal does not find that they provide real insight into the parties' long term plans other than buying a house. Nor do they discuss what agreement the parties might have come to in terms of their future as it related to children, through either medical intervention or adoption. The Tribunal considers this is something that the parties and their respective family circles would have discussed in terms of how they might provide support.

30. The Tribunal again referred to "*limited independent evidence from institutions to show the parties have legal obligations to one another, to indicate that the relationship is a genuine and continuing one*" (CB 302 at [46]). It noted the parties' evidence that they intended to travel to India together to attend the Applicant's sister's wedding. However, the Tribunal stated that it was not satisfied that the parties are attending as spouses, particularly in light of what the Tribunal described as "*the limited credible evidence submitted that the sponsor has been accepted by the visa applicant's parents as being in a genuine and continuing spousal relationship with their son*" (CB 302 at [47]).

31. *The nature of the parties' commitment*

32. The Tribunal commenced discussing this factor by disavowing the relevance of an age difference between a visa Applicant and sponsor and the fact that having a child together is indicative of two persons having a genuine and continuing spousal relationship. This, however, was qualified by the Tribunal's assertion that the combination of these factors would not be an impediment to a genuine and continuing spousal relationship *provided* the couple had had a meaningful

discussion and had come to an agreed conclusion that they may not have children or, alternatively, that they would take steps which were credible to having a child naturally or through medical intervention.

33. The Tribunal expressed its approach thus (CB 302 at [49]):

The Tribunal also has concerns about the parties' statements at hearing about their future in terms of family life. The Tribunal does not in any way consider having a child together indicative of two persons in a genuine and continuing relationship. As explained to the parties, the Regulations and common sense dictates that an age difference between a couple is no impediment to a genuine and continuing spousal relationship. This is particularly so where the couples have had meaningful discussions about this matter and have come to an agreed conclusion that they might not have children, or if they are both committed to doing so, are taking credible steps that indicate that the parties have a genuine commitment to having a child either naturally or through medical intervention or indeed adoption.

34. As ground one of the Applicant's judicial review is directed to the reasoning of the Tribunal regarding the question of children, it is appropriate to set out in full the relevant extracts from the Tribunal's decision record (CB 303 at [50]-[55]):

50. When the Tribunal asked the visa applicant how he might feel about the prospect of not having biological children, he respondent unrealistically that they were already trying but that if they did not succeed then they would adopt a child. When asked whether, given the sponsor was 52 years of age, they had sought medical advice or medical intervention, the sponsor stated that they had not as yet. He stated that if he had to go offshore he could not leave the sponsor, indicating his visa status had to be settled first.

51. The Tribunal does not find it plausible that had the parties had a genuine mutual goal to have a family they would not have sought medical advice early on when the parties married in 2011 when the possibility of the sponsor falling pregnant might have been more of a prospect, and that indeed, if they intended to adopt a child, they would not have taken concrete steps to do so by now. More unrealistic was the visa applicant's statements that they were trying naturally now and that only if they failed would they seek medical intervention or adopt. The Tribunal does not accept, given the sponsor's age, that had they wanted a child

together they would wait until the process of his visa was finalised to do so.

52. The Tribunal attempted to gauge whether the visa applicant had given any thought to the fact that he might never have children with the sponsor and the Tribunal found that his response showed a decided lack of thought or consideration of the matter; only stating that he was “already happy with her”. Whilst the Tribunal accepts that just because a couple do not have, children, does not mean that a relationship is not genuine and continuing relationship, the Tribunal was attempting to have a realistic discussion about whether he felt any grief about not having any biological children; and how others who were important in his life, such as his parents, might feel about him not having children. The visa applicant simply responded with less than convincing statements about being happy with the sponsor.

53. The Tribunal would have expected that the visa applicant might say that he had, for example, thought about the matter but that whilst marrying the sponsor might mean he missed out on some things in life, his companionship with the sponsor was paramount and that having children would always be secondary to their fundamental commitment to one another.

54. When the Tribunal asked the sponsor whether she had concerns that the visa applicant might down the track want to have his own children, she dismissed the issue and stated that they had agreed that they were happy not to have children and that indeed the visa applicant loved dogs. The Tribunal put it to the sponsor that the visa applicant had stated that he did want children. The sponsor then revised her account and stated that they were still talking about it and they might adopt. The Tribunal stated that if they were serious about this matter they would have already made progress in this direction either through medical intervention or otherwise. The sponsor then stated that she did not have to have a child to secure a relationship. She stated that the visa applicant had had troubles pursuing payments from his previous employer and it (sic) they had had a stressful time. He had only recently obtained more secure work. She stated that one of them had to be a full-time worker and on a good income to look after a child. She stated that they did not know where they stood in terms of the visa applicant’s residency.

55. The Tribunal does not find the sponsor’s statements in this respect convincing. Whilst it is true that the parties’ economic position is not particularly strong, it is not totally abject either. This is particularly so as the parties do not have a mortgage and

it is not clear to what extent the sponsor might have other savings or investments given that she was previously married and has adult sons.

35. The Tribunal then proceeded to express its concerns about the inception of the relationship as follows (CB 304 at [57]):

... the Tribunal is not satisfied that, given the applicant's status in Australia was not resolved, that he would have made a decision to enter hastily into a marriage without having thought through the consequences for his future in a meaningful way. The Tribunal also finds it somewhat unrealistic that the sponsor was ready to embark upon a new relationship with all the complexities entailed, given the visa applicant's residency status, when she had been through a troubled relationship previously. The fact that these concerns were dismissed by the parties raises real concerns for the Tribunal that they do not see this as a genuine and continuing spousal relationship.

36. As will be apparent from the authorities referred to below, the reliance by the Tribunal on the bona fides of the inception of the relationship is inconsistent with principle.

37. Judicial Review

38. Ground one

39. Ground one of the Applicant's Amended Application for Judicial Review is as follows:

1. The Tribunal failed to apply the correct test in relation to the expression "genuine and continuing".

Particulars

a. The Tribunal gave great weight to the fact that the applicant and the sponsor had not seriously turned their mind to the question of children.

b. However, this says nothing about whether or not the bond between them is genuine, in the sense of "real" or "true", as opposed to genuine in the sense of "responsible", "wise" or "advisable".

c. Nor does it say anything about whether or not the bond between them is continuing, in the sense of presently ongoing, as opposed to “until death do them part”.

d. The great weight which the Tribunal placed on the applicant and the sponsor’s approach to the question of children gives rise to the inference that the Tribunal thought that the relationship between the applicant and the sponsor was not “responsible”, “wise” or “advisable”, or was not going to last “until death do them part”.

40. The question for determination under this ground of review is whether the Tribunal’s approach to the application of sub-s.5F(2)(c) of the Act evident in its decision record, revealed a misunderstanding of the proper application of those provisions, or a failure to apply the correct test in relation to those provisions. In particular, the focus is on what is said to be an incorrect application of the test, of the phrase, “*genuine and continuing*”.

41. It is to be recalled that sub-s.5F(2)(c) of the Act, which defines the meaning of the word “*spouse*”, relevantly provides at subsection (1) that a person is a spouse of another if the “*2 persons are in a **married** relationship*” and that for this purpose, under subsection (2), persons are in a **married** relationship if:

(a) they are married to each other under a marriage that is valid for the purposes of this Act; and

(b) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and

(c) the relationship between them is genuine and continuing; and

(d) they:

(i) live together; or

(ii) do not live separately and apart on a permanent basis.

...

42. I agree with the Applicant’s argument that each of (a), (b), (c) and (d) of sub-s.5F(2) of the Act are separate conditions which the Tribunal

must be satisfied exist at the time of its decision. No doubt factual matters may be relevant to one of more of these conditions, however each condition stands on its own and must be considered as such. The first of these conditions is that the persons be married under a valid marriage. The second is that they have a mutual commitment to a shared life as husband and wife. The third is that the relationship between them is genuine and continuing. The fourth is that they live together or do not live separately and apart on a permanent basis.

43. I further agree that the proper construction of sub-s.5F(2)(c) of the Act is that the focus of that provision is about the relationship, such as it is. It is not to be qualified by attention to whether or not the quality of that relationship otherwise answers the description of a married relationship of husband and wife: see sub-s.5F(2)(a) and (b) of the Act. If the legislature intended that the reference to “*the relationship*” in sub-s.5F(2)(c) of the Act was to be qualified somehow by reference to the qualities of a marriage relationship or a shared life as husband and wife, it would have inserted the word “*married*” or “*husband and wife*” as used in sub-s.5F(2)(a) and (b) of the Act, prior to the words “*the relationship*”.
44. There is no authority as to what is contemplated by the requirement that the relationship be “*genuine and continuing*”. The assessment as to whether the relationship is genuine and continuing must focus on the relationship as it is, at the time of the Tribunal decision. The reasons for the parties entering the relationship are not to be taken as an indication that the relationship is not genuine. Parties may enter into a relationship for motives which are not necessarily genuine. It may be that the relationship is commenced for the very purpose of a person obtaining a visa. It may be that the relationship was entered into for reasons which were ill-conceived or precipitous. However, this is not relevant in considering whether the parties, at the time of the Tribunal decision, have a mutual commitment to a shared life: see *Kayikci v Minister for Immigration and Citizenship* [2009] FCA 92 at [24] (“*Kayikci*”); *Singh v Minister for Immigration and Border Protection* [2016] FCCA 114 at [53]. Nor, in my opinion, can the conduct or motive at the commencement of the relationship be determinative of whether the parties’ relationship at the time of the Tribunal decision is genuine and continuing.

45. The word “*genuine*” is not defined in the Act. Its ordinary dictionary meaning may provide some assistance. The English Oxford Dictionary (on-line), in relation to persons, defines “*genuine*” as “*free from affectation or hypocrisy*”. I agree with the Applicant that the use of the word *genuine* must refer to a relationship which is, at the relevant time, neither a sham nor a false relationship.
46. The word “*continuing*” is also not defined in the Act. I agree with the Applicant that it cannot mean that the Tribunal is required to be satisfied that the relationship will endure for a period beyond that which is reasonably foreseeable. It cannot require that the parties satisfy the Tribunal that their relationship is one that will last into the long-term. In my opinion, this would place a gloss on the word “*continuing*” that is simply not apparent when regard is had to the length of time legally binding marriages endure. It certainly does not require and, in my opinion, would amount to an incorrect test, for the Tribunal to speculate regarding matters that might arise in a period beyond the foreseeable future, which would affect the relationship of the persons or couple.
47. The Applicant submits that it is apparent from the reasoning of the Tribunal from paragraphs [49] to [57] of its decision record that, although these paragraphs fell under the heading “*the nature of the parties’ commitment*”, the matters considered therein were matters the Tribunal considered relevant to the mandatory consideration of a relationship that is *genuine and continuing*. I agree with this submission. This is evident by the Tribunal’s reference to the relevance of the parties’ consideration of having a child together to the question of a “*genuine and continuing spousal relationship*” (CB 302 at [49]). Further, the Tribunal itself links, what it describes as the complexities of the relationship, with its concern about the conception of the relationship and the mandatory criterion “*genuine and continuing spousal relationship*” (CB 304 at [57]). I am satisfied, having regard to the Tribunal decision record, that the Tribunal considered the mandatory criterion under sub-s.5F(2)(c) of the Act, at the same time it considered the nature of the parties’ commitment, as provided for in the Regulations.

48. The Applicant submits that paragraphs [39] to [57] of the Tribunal decision record are a compelling indication that the Tribunal expected that, at the commencement of their relationship, the parties would have had mature and sensible discussions about children. However, it is argued, the reasoning says nothing about whether or not their relationship, such as it was, was genuine and continuing. The Applicant argues that the Tribunal accepted that there was a relationship; the Applicant and the sponsor had lived together for some time; they had some degree of financial intermingling and social interactions; and they had plans to travel to India (although it doubted whether they intended to travel as a couple). The Applicant submits that because he and the sponsor had not had the kind of mature sensible discussions that the Tribunal would have expected of them, about what it regarded as the important issue of children, this tended powerfully against the claim that their relationship is genuine and continuing. Indeed, it is noted that in paragraph [54] of the Tribunal decision record, the Tribunal stated that if they were serious about children, they would have already made progress in this direction, either through medical intervention or otherwise.
49. The Applicant submits that the reasoning of the Tribunal between paragraphs [49] and [57] of the Tribunal decision record, discloses the application of standards or conventional assumptions about what was expected to be evident in the discussions as between the sponsor and the Applicant at the commencement of their relationship, in order to have persuaded the Tribunal that their relationship was genuine and continuing. The Applicant submits that it is not apparent that the Tribunal was concerned with whether the relationship between the Applicant and the sponsor would be a continuing one, but rather it was the genuine aspect of the criterion that was troubling the Tribunal. And, in that respect, the Applicant argues that in effect the Tribunal has formed the view that, as the parties have not had the sort of mature discussions one would expect, this tends to suggest that their relationship is not genuine.
50. In so doing, the Applicant argues, the Tribunal applied the wrong test, in that the question of “*genuineness*” is not to be determined by reference to the motivations, behaviour and conduct of parties when they commence a relationship.

51. The Applicant submits that the fact that the parties, adopting the language of the Tribunal, did not have a mature discussion about their plans in relation to children, may in the Tribunal's mind be considered foolhardy or naïve, but this fact does not render the relationship any less genuine. The Applicant submits that the correct test, which the Tribunal failed to apply, was, "*is the relationship between these parties, such as it is, genuine in the sense of not a sham, real, true, not false?*"
52. The Applicant points out that the question of the age difference between the Applicant and the sponsor, and the sponsor's incapacity to bear children, was raised by the Tribunal during the hearing in the following exchanges, extracts of which were transcribed and annexed as "XW 1" to the affidavit of Xin Wu filed on 29 October 2015. These extracts relied on by the Applicant are set out in full below.
53. From 12:04 to 15:43:
- Tribunal: Your wife is 52 years of age; so how do you feel that of not having children? How do your grandparents feel of not having children?*
- Applicant: We will have a plan to adopt one if we don't having.*
- Tribunal: What do you mean if you are going having?*
- Applicant: Like we are trying...*
- Tribunal: How are you trying? ..She is 52, I don't think, has she got medical advice?*
- Applicant: No, we don't.*
- Tribunal: Without medical intervention, how can she have a child?*
- Applicant: She don't have a child, we will adopt one.*
- Tribunal: And you discussed it?*
- Applicant: Yes, we did. We were just setting up over teeth... So when we are... like... able to like...*
- Tribunal: Have you done any arrangement, have you done any investigation?*

Applicant: No, not yet, not yet. Once everything finishes this year, so I would know that we are together here, we are going to try in our future.

Tribunal: If you really want a child, why don't you start taking medical intervention, IVF or something, at least try then it wouldn't be difficult. Four years ago, when you wife was only been 48, it might be a bit easier, not much easier but...

Applicant: But we don't know how this thing would go. If I got permanent here or not, depending on that, if we have child if we got child, I don't get permanent then I would have to go back then she needs to rise the child by her own.

Tribunal: Yea, but you could keep trying, you could keep trying depends on that, if you could have a child in time.

So in terms of actually, have you spoken to a doctor together, have you gone to a doctor together?

Applicant: No, we havne't gone.

Tribunal: Why not?

Applicant: Because we are just finding us not having a baby now.

Tribunal: Is this the reason why a more important...

Applicant: No, it is not more important. The thing is if I haven't got my approve of my staying in here, then I have to go back. She will be here by her own, she has to hurt as well, it is really hard for her, but if I stay here, then we are together, so we can do something in the future.

Tribunal: Well, I mean in terms of her capacity of access of IVF and even adoption is running out, because of her age. And she already got two; so she knows what it is to raise children. But you don't, and you are looking at possibly not ever having children. How do you feel about that?

Applicant: I already happy with her, if she doesn't have children, we would go to medical intervention, we would do to doctor, if it is not possible, we would adopt one.

Tribunal: Adoption has a long time, and if you are serious about it, you would make some enquiries already with relevant authorities.

Applicant: We just haven't done it yet.

54. From 1:06:38 to 1:13:10:

Tribunal: No, no, no. Your relationship as I said is romantic and positive. But how do you in your mind thought that there is a possibility people change and grow, they might just have been.

Sponsor: But I would say my marriage would have been there, I was married for 25 years. If you could ask me when the time I got married, do you think in 25 years, you gonna get divorced because he has gone with someone else. That to me is a similar sort of question.

Tribunal: No, it is not a similar sort of question. This gentlemen is very young. As I said, he has all these cultural expectations on him that you may not understand,

Sponsor: Okay, I agree.

Tribunal: I don't get the feeling for how you discussed these issues, how you recon (sic), you know whether the parents reconcile to that.

Sponsor: We talked about it numerous times, we talked about it before we got married. We talked about that after we got married.

Tribunal: So you are saying if within a year's time, he meets someone who he could have his own family that you are accepting of that?

Sponsor: No, I am not accepting that thing, as I say again, he knows the same as the ex-husband knew that wouldn't happen.

Tribunal: But you said it can happen. If you were at an age that was more similar, you know ahead you would be able to have children, or if you started medical intervention a lot earlier, I would say yes he's committed, there are moves here to make it genuine, to make it a lasting relationship. But that hasn't happen, and it doesn't matter ordinarily. Do you see that as I said, in a year's time he may say, I making a momentum decision here of not to have children. That is a big decision for a young man to make. Never to have biological children.

Sponsor: We haven't totally ruled it out, like it's not ruled out either. We haven't say right, we are not having kids.

Tribunal: No, no, you haven't, as I said but science sort of ruled it out for you.

Sponsor: I haven't actually closely gone down that we needed to find out the possibilities. As I said, it would be sort of up in the air a bit with work commitment and stress things like that. It has made it very hard.

Tribunal: Sure, I appreciate that, but had you asked yourself the question that I put to you. What if in year's time, as people's stability changes, what different things. Because of his age, because you say you are stable, because you have your children, you have your finance, you on your feet in terms of what's happen, and you just have the stability. But he might want in only a year or two, he might think oh... you know I do want children, and that is not an unreasonable thing to want either. Have you thought of where do I stand here then?

Sponsor: I know the situation is different, if everyone thought in that way...

Tribunal: But what indication has he given to you that he is there for you for the long haul, and has he said to you that I am committed to you and the relationship is mutually exclusive? And that I am prepared to never have children and stay with you. Has he said that?

Sponsor: Well, he said that, he said that. We both have sort of spoken about it. We both agree we want to be with each other, like we are pretty much with each other all the time.

Tribunal: But you gotta understand someone his age may develop and change and grow and they want to be a father and have my kids because he wants to make his parents to be grandparents. Do you see what I'm saying? Have you asked yourself that or how am I going to cope with that if that happens?

Sponsor: Well, we have spoken about that. As I said, that is the way we want to go. We want to be together. He is not looking together or I don't want to go our elsewhere. But my understanding is that it would be the same as anyone...

Tribunal: But he might be so motivated to remain in Australia and get a visa. You know, he convinced himself it doesn't matter if he doesn't have children. I just don't get a sense of how this has all been communicated though the family either or how they responded to it. Mr. Singh, Mr. Malhi sorry, keeps saying that they say if you are happy, then I'm happy. But that is not realistic, I think, you know his parents would think oh that's so

disappointing, we are not going to have grandchildren, this is totally untraditional.

Sponsor: We do talk about children, his parents say you know, they are happy for you to have children or whatever and he said he is happy with that.

55. The Applicant relies on the decision of *Kayikci*. In particular, his Honour's reliance, at [24]-[25] of the decision, on the observations of the Full Court in *Minister of State for Immigration, Local Government and Ethnic Affairs v Dhillon* (unreported, Northrop, Wilcox and French JJ, 8 May 1990) that:

*...people enter marriages with a variety of purposes and motives, hopes and anticipations, so that it is not possible to classify some purposes etc. as according to what may be described as 'community expectations'. It is **not necessarily inconsistent with a genuine marriage relationship** that it was **entered into by one or both parties with a view to material benefit or advancement**, as for example with the hope of becoming eligible to reside in a particular country. The **true test**, we would suggest the only test, **is whether at the time at which the matter has to be decided it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others.**' (Emphasis added.)*

25. These observations emphasise that the relevant time for examination of the question of whether a marriage is genuine is the period over which the genuineness of the relationship must be decided, and that this is the central point of reference. It also indicates that the fact that a relationship may be seen to confer a benefit as to residence entitlement does not of itself mean that the relationship is not genuine.

56. The Minister's submissions are cogently set out in the First Respondent's Outline of Submissions, the relevant paragraphs are extracted in full below:

17. Firstly, the first respondent accepts that a 'genuine and continuing' relationship can be one that is flawed.

17.1 This much was found by Judge Riley, in Singh v Minister for Immigration & Anor [2016] FCCA 114.

17.2 In Singh at [53], Judge Riley concluded that the Tribunal erred when it did not accept the ‘conflicting expectations, demands and mutual distress’ as precluding the ‘characteristics of a relationship between parties who share a mutual commitment’. He Honour considered that a fundamentally flawed relationship could simultaneously be one in which the parties have a mutual commitment to a shared life.

18. However, the first respondent submits that the passages referred to by the applicant ([50]-[54]), properly understood, should be regarded as the Tribunal examining the nature of the parties’ commitment to each other. This included whether they had discussed the question of children generally, given their respective age differences. It was not done with the view to finding that the lack of plans to have children was a matter that went to the genuineness of the relationship. This much is clear from the Tribunal’s explicit statement at [52].

19. When the reasons regarding the Tribunal’s consideration of the nature of the parties commitment are read as a whole, it is clear that the Tribunal was simply discussing with the parties about any plans to have children.

20. The first respondent submits that what the Tribunal was doing in the passages following those referred to by the applicant ([55]-[56]), was asking the parties what meaningful discussions had been had regarding children and whether the parties had in fact discussed children.

21. The applicant asserts that in placing such weight on the fact that the applicant and the sponsor had not seriously considered and addressed the question of children, it is to be inferred that the Tribunal understood the expression “genuine and continuing” to have a different, and more onerous, meaning than the actual test.

22. The first respondent submits that this is the wrong construction of the Tribunal decision.

23. The Tribunal clearly stated its reasoning as follows:

[52] ... Whilst the Tribunal accepts that just because a couple do not have, children, does not mean that a relationship is not genuine and continuing relationship, the Tribunal was attempting to have a realistic discussion about whether he felt any grief about not having any biological children; and how others who were important in his life,

such as his parents, might feel about him not having children. The visa applicant simply responded with less than convincing statements about being happy with the sponsor.

24. The first respondent submits that it is critical to bear in mind the context in which the Tribunal was here considering the question of children. It was undertaken under the heading of “The nature of the parties’ commitment”, which is only one of the four mandatory relevant considerations in regulation 1.15A(3) of the Regulations.

24.1 In circumstances where the facts before it included a significant age difference with the applicant, the Tribunal indicated at [49] that “[A]s explained to the parties, the Regulations and common sense dictates that an age difference between a couple is no impediment to a genuine and continuing spousal relationship’, the Tribunal sought to assess the nature of the parties’ commitment to each other by exploring whether they had ‘meaningful discussions’ about children and had reached an agreed conclusion.

24.2. That assessment about whether children had been discussed, at [56], concluded with the statement that “[A]part from the concerns held about the parties having had any meaningful discussions about the implications of the age difference. It prompted the Tribunal in the same sentence to articulate more concerns which it was troubled by, in relation to other aspects of the relationship.

24.3. Properly understood, this issue was merely one of many strands of reasoning which caused the Tribunal to doubt the veracity of the evidence given to it.

25. The first respondent contends there is no basis for the inference asserted by the applicant, at [22] of his outline of submissions, in the face of the Tribunal’s explicit indications to the contrary, that the question of children (or lack thereof) was found by the Tribunal to be inconsistent with the existence of a ‘genuine and continuing’ relationship.

57. The Minister further submits that, even if the Court were to find that the Tribunal misinterpreted the requirements of the Act and the Regulations, this would not necessarily constitute jurisdictional error. The Minister relies on the decision of *Re Minister for Immigration and Multicultural Affairs; ex parte Cohen* [2001] HCA 10 (“Cohen”), and

the extracts from McHugh J's judgment, where his Honour says the following at [34] to [36], in relation to other provisions under the Act:

34. The applicant submits that the Tribunal "misunderstood the nature of the opinion which [it] is to form". He submits that the Tribunal did not understand the true meaning of "disability" and "other serious circumstance" in the definition of "special need relative" in reg 1.03. But, assuming that the Tribunal erred in determining the meaning of these expressions because it applied an erroneous precedent in determining the meaning of "disability" and "other serious circumstance," it does not follow that it committed a jurisdictional error. Adopting an incorrect interpretation is not always synonymous with jurisdictional error. Nor does it make a difference to the validity of that proposition that the relevant tribunal has applied an erroneous precedent rather than adopting its own erroneous interpretation.

35. The Tribunal understood the question that it had to answer. Even if it applied an erroneous precedent, it did not commit a jurisdictional error. The expressions "disability" and "other serious circumstances" were used in reg 1.03 in their ordinary, non-technical sense. The ordinary meaning or common understanding of a non-technical word is generally a question of fact. Leaving aside questions of jurisdictional fact, an administrative tribunal will ordinarily not commit a jurisdictional error unless it has made an error of law. A factual error made in the course of making a determination or decision is unlikely to be a jurisdictional error unless the particular fact is a jurisdictional fact. Courts should be slow to find that an erroneous finding of fact or an error of reasoning in finding a fact, made in the course of making a decision, demonstrates that an administrative tribunal so misunderstood the question it had to decide that its error constituted a jurisdictional error.

36. If an administrative tribunal applies a wrong legal test or asks itself or decides a wrong legal question, it may be a short step to concluding that it did not decide the question that it had to decide. But questions of fact are ordinarily for an administrative tribunal to determine and so are the reasoning processes employed to make such findings. Disagreement with a finding of fact or the reasoning process used to find it is usually a slender ground for concluding that a tribunal misconceived its duty.

58. (footnotes omitted)

59. The Minister submits that, in that case, the Tribunal understood the question that it had to answer. Here, the Tribunal was dealing with a discrepancy in the parties' evidence, between the Applicant and the sponsor, the second witness. The Tribunal, the Minister argues, merely addressed itself to the veracity of the evidence and the consistency of the evidence, following which it made a judgement about the question of the parties' mutual commitment. The Minister submits that the question of a genuine and continuing relationship and mutual commitment are subjective terms, and therefore that is a question of fact for the Tribunal, and does not constitute jurisdictional error.

60. Consideration

61. For the reasons set out below, I am satisfied that the Tribunal engaged in jurisdictional error, in that it misunderstood, and thereby failed to undertake, the statutory task it was required to undertake. This task was to satisfy itself regarding the mandatory condition sub-s.5F(2)(c) of the Act: namely, whether the relationship between the parties is genuine and continuing.

62. I reject the Minister's submission that the extracts relied on by the Applicant should be characterised as the Tribunal exploring the nature of the parties' relationship with each other, including whether they had discussed the question of children generally, given their age difference. The Minister relies on the express statement by the Tribunal at [52] of the decision record where it stated, “[w]hilst the Tribunal accepts that just because a couple do not have, children, (sic) does not mean that a relationship is not (sic) genuine and continuing relationship.” Much the same statement was made by the Tribunal at [49] of the decision record (extracted in full at [27] above). However, as I have noted earlier, this disavowal of the fact that a couple do not have children, does not mean the relationship is “*genuine and continuing*”, is qualified by a requirement by the Tribunal that the parties have had a meaningful or mature discussion about the fact their relationship may not include children in the future.

63. There are two things which can be said about the Tribunal's approach. Firstly, it is apparent that the Tribunal was clearly focused on the discussions or conduct of the parties at the commencement of their relationship. The Tribunal said that it “*does not find it plausible that*

had the parties had a genuine mutual goal to have a family they would not have sought medical advice early on when the parties married in 2011” (CB 303 at [51]). Referring to the possibility of adoption, the Tribunal said that it did not accept “given the sponsor’s age”, that they would have waited until the Applicant’s process of visa application was finalised (CB 303 at [51]). Finally, in my opinion, at paragraph [56] of the decision record, the Tribunal links its concerns regarding the parties’ absence of a meaningful discussion regarding children, to the inception of the relationship. This is evident from the opening sentence (CB 304 at [56]):

Apart from the concerns held about the parties having had any meaningful discussion about the implications of the age difference, the Tribunal is also troubled by the inception and development of the relationship...

64. In this paragraph, the Tribunal refers to the fact that the sponsor had (from the Tribunal’s point of view) entered in undue haste into a relationship with the Applicant, after the ending of a difficult relationship with her ex-husband.
65. Secondly, it is evident that, notwithstanding the use of the heading “*The nature of the parties’ commitment*”, the Tribunal’s detailed consideration about the issue of children and the evidence given by the parties when questioned about this matter at the hearing, was treated by the Tribunal as relevant to the mandatory consideration about which it was required to be satisfied; namely, that the relationship was genuine and continuing. I have already referred to the Tribunal’s express reference to this condition at [49] and [52] of the decision record. In addition, the Tribunal said, in its penultimate paragraph (before finding at [58] that the Applicant did not meet cl.801.221(2)(c) to sch.2 of the Regulations), referring to its concerns regarding the inception of the relationship that “[t]he fact that these concerns were dismissed by the parties raises real concerns for the Tribunal that they do not see this as a genuine and continuing spousal relationship” (CB 304 at [57]).
66. Accordingly, I am satisfied that the Tribunal, in its reasoning, contained in paragraphs [49] to [57] of the decision record, was concerned with a mandatory consideration it was required to be satisfied of; namely, that the relationship of the parties was genuine and continuing. It may be

that this reasoning also affected the Tribunal's findings about the nature of the parties' commitment, but the Tribunal never expressly made this clear. There was some reference to this consideration contained in reg.1.15A of the Regulations, when the Tribunal opined that the Applicant might have given evidence, "*that having children would always be secondary to their fundamental commitment to one another*" (CB 303 at [53]). This somewhat indirect reference stands in complete contrast to the Tribunal's express references to the mandatory condition in sub-s.5F(2)(c) (see [56]) above).

67. I have no doubt that these issues: the age difference between the parties, the incapacity of the sponsor to bear children and the absence of a meaningful or mature discussion about the question of children at the commencement or early on in the relationship was critical to the formation by the Tribunal, of its lack of satisfaction that the relationship was a genuine or continuing one. I reject the Minister's submission that the issue of children was but one consideration along with other concerns: such as the circumstances surrounding the inception of the relationship. I note here that the Tribunal's focus on the circumstances surrounding the inception of the relationship as a reason for doubting the genuineness of the relationship also disclosed an error in its reasoning. In my opinion, when regard is had to the whole of the Tribunal's reasoning (from [49] to [57] of the decision record), the issue of children and what it saw as an absence of a mature discussion at the commencement or early into the relationship (particularly in light of the Applicant's background) overwhelmed its consideration of other matters. Reading the decision as a whole, it is apparent that this was critical to the Tribunal's ultimate disposition of the review.
68. I agree with the Applicant that, in focusing on the absence of a convincing, mature or meaningful discussion regarding the prospect of children at the commencement or early in the relationship between a female sponsor who, at the time, was around 48 years of age, and the Applicant, who was 22 years of age, the Tribunal failed to satisfy the condition it was required to be satisfied: that is, whether the relationship, at the time of the Tribunal decision, was a genuine and continuing one.

69. In my opinion, the Minister's reliance on the judgment of McHugh in *Cohen* is misplaced. The Tribunal's decision was not one where it understood the question to be asked but failed to apply a correct precedent, or erred in a finding of fact. As will be evident from the discussion above, the Tribunal plainly misunderstood the question to be asked.

70. Accordingly, I find that the Tribunal engaged in jurisdictional error.

71. Ground Two

72. The second ground of judicial review is as follows:

The Tribunal failed to afford to an applicant an opportunity to give evidence and present arguments in relation to the issues arising in relation to the decision under review.

Particulars

a. An issue that arose in relation to this review was whether the affidavit submitted by the applicant's parents was genuine.

b. The affidavit was relevant to a critical issue, evident from the comment at [30] of the Reasons, "[the Tribunal has] concerns about the extent to which the marriage is recognised by their respective families and friends as a genuine and continuing one.

c. The Tribunal did not raise the issue of the genuineness of the applicant's parent's affidavit with the applicant, by written correspondence or at the oral hearing, and the applicant was not aware of this issue until after the review was concluded.

d. In that circumstance, the applicant was denied his right to give evidence and present arguments in relation to this issue, because he was not aware that this was an issue in the review until after it was concluded: SZBEL v Minister for Immigration (2006) 228 CLR 152.

73. Section 360 of the Act relevantly provides that a Tribunal, upon a valid application for review being made, must invite an Applicant to give

evidence and present arguments relating to the issues arising in relation to the decision under review.

74. The Applicant's submission rests on the decision of the High Court in relation to s.425 of the Act in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152 ("*SZBEL*"). At [35], the Court said:

The Tribunal is not confined to whatever may have been the issues that the delegate considered. The issues that arise in relation to the decision are to be identified by the Tribunal. But if the Tribunal takes no step to identify some issue other than those that the delegate considered dispositive, and does not tell the applicant what that other issue is, the applicant is entitled to assume that the issues the delegate considered dispositive are "the issues arising in relation to the decision under review". That is why the point at which to begin the identification of issues arising in relation to the decision under review will usually be the reasons given for that decision. And unless some other additional issues are identified by the Tribunal (as they may be), it would ordinarily follow that, on review by the Tribunal, the issues arising in relation to the decision under review would be those which the original decision-maker identified as determinative against the applicant.

75. At [36], the Court in *SZBEL* held that s.425 of the Act requires the Tribunal to disclose to an applicant additional issues which were not live issues in the delegate's decision, or otherwise made known to the applicant as being in issue. If the Tribunal proposes to make an adverse finding on a matter where the delegate accepted or found no deficiency in the applicant's claims, and the applicant has not otherwise been notified that the matter is in issue, the Tribunal should disclose to the applicant that it has a concern about the matter. The Court, however, observed at [46] to [48]:

46. Three further general points should be made.

47. First, there may well be cases, perhaps many cases, where either the delegate's decision, or the Tribunal's statements or questions during a hearing, sufficiently indicate to an applicant that everything he or she says in support of the application is in issue. That indication may be given in many ways. It is not necessary (and often would be inappropriate) for the Tribunal to put to an applicant, in so many words, that he or she is lying, that

he or she may not be accepted as a witness of truth, or that he or she may be thought to be embellishing the account that is given of certain events. The proceedings are not adversarial and the Tribunal is not, and is not to adopt the position of, a contradictor. But where, as here, there are specific aspects of an applicant's account, that the Tribunal considers may be important to the decision and may be open to doubt, the Tribunal must at least ask the applicant to expand upon those aspects of the account and ask the applicant to explain why the account should be accepted.

48. Secondly, as Lord Diplock said in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry*:

“the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If this were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would have to be abolished.”

Procedural fairness does not require the Tribunal to give an applicant a running commentary upon what it thinks about the evidence that is given. On the contrary, to adopt such a course would be likely to run a serious risk of conveying an impression of prejudice.

(footnotes omitted)

76. The Applicant submits that the Tribunal placed no weight on an affidavit prepared by his parents and provided to the Tribunal (a copy of which is contained at CB 17), because of the doubts the Tribunal held about its authenticity. It is submitted that the affidavit was relevant to a critical issue; this being the Tribunal's concerns about the extent to which the parties' respective families and friends recognised their relationship as a genuine and continuing one (CB 300 at [30]). The Applicant argues that, as the authenticity of the affidavit was not drawn to the Applicant's attention during the hearing, he was denied the opportunity to give evidence and present arguments in relation to this issue; that is the authenticity of the affidavit. Thus, the Tribunal failed to comply with s.360 of the Act and fell into jurisdictional error.

77. There seems to be no dispute that the issue of the “*authenticity*” of the Applicant’s parents’ affidavit was raised with the Applicant during the hearing.
78. The Applicant filed an affidavit on 30 October 2015, deposing to the way in which his parents’ affidavit was prepared. In summary, he deposes:
- a) the Applicant’s parents told his sister the information they wanted to have recorded in the affidavit;
 - b) the Applicant’s sister translated that information into English;
 - c) the Applicant’s parents took the translation to the District Court, where a court officer transcribed it into an affidavit; and
 - d) the Applicant’s parents deposed to the affidavit prepared by the court officer, containing only the information which they had caused to be included in the affidavit.
79. The relevant extracts from the Tribunal’s decision record in relation to the Applicant’s parents’ affidavit and the critical issue are at paragraph [36] (which is set out in full at [19] above) and [37] (which is partially extracted at [20] above). At [38] of the decision record, the Tribunal commenced by stating:
- The Tribunal’s concerns about the Affidavit being a true representation of the visa applicant’s parents’ reflections on the marriage were reinforced at hearing when the Tribunal asked the visa applicant to recount the discussion he had with his parents about his marriage ... The visa applicant simply repeated that they had stated that if he was happy, they were happy. The Tribunal does not consider this is a realistic representation of the kind of discussion the visa applicant would have had with his parents...*
80. The Tribunal’s general view about the various affidavits is expressed at [45] (which is reproduced in full at [24] above).
81. I am not satisfied that the issue, which the Applicant asserts the Tribunal failed to draw to the Applicant’s notice to provide him with the opportunity to give evidence or present arguments, was the critical issue which impelled the Tribunal to give little weight to the

Applicant's parents' affidavit as well as other "*third party statements*". The issue identified by the Applicant was the authenticity of his parents' affidavit.

82. I agree with the Minister's submission that, in fact, the critical issue was that the Tribunal did not accept the truth of the statements made in the affidavit.
83. The Tribunal questioned how, if the Applicant's parents did not speak English, they were able to prepare the affidavit (as it was clearly not a translation), in the absence of any meaningful discussions between the sponsor and the Applicant's parents: see paragraph [36] (extracted at [19] above).
84. Furthermore, as is made clear in *SZBEL*, the Tribunal was not required to provide a running commentary to the Applicant about its views of its evidence. I agree with the Minister's submission that the Applicant was not entitled to assume that the Tribunal would accept the truth of the statements made in the affidavit, and the Tribunal did not need to tell him that it may reject those statements, where the evidence in that affidavit was inconsistent with evidence provided by the parties at the hearing.
85. Accordingly, I am not satisfied that jurisdictional error arises on this ground of judicial review.

Conclusion

86. For the reasons set out in this judgment, Orders will be made quashing the decision of the Second Respondent and requiring the Second Respondent to determine the matter according to law. An Order that the First Respondent pay the Applicant's costs shall also be made.

I certify that the preceding seventy-five (75) paragraphs are a true copy of the reasons for judgment of Judge Jones

Date: 2 February 2017